

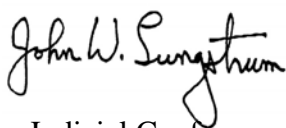
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September 9, 2004

MEMORANDUM TO: Judges, United States District Courts
Clerks, United States District Courts
District Court Executives

FROM: John W. Lungstrum 

SUBJECT: Implementation of the Judicial Conference Policy on Privacy and
Public Access to Electronic Criminal Case Files

DATE: September 1, 2004

ACTION: **November 1, 2004**

November 1, 2004 has been set as the date for district courts to implement the new Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files. At that time, courts should make electronic criminal case file documents available to the public via remote access pursuant to the implementation guidelines and model local rule adopted by the Judicial Conference.¹ The policy is available at <http://www.privacy.uscourts.gov/crimimpl.htm>. Implementation of the policy has been delayed until November 1st because software changes to the current CM/ECF product were necessary to implement this new policy. These changes will be implemented in Version 2.2, which will be available to the courts in mid-September, and the Systems Deployment and Support Division of the Administrative Office's Office of Information Technology will be contacting your CM/ECF Project Managers and systems staff shortly with information about the software release.

¹ The Judicial Conference's 2003 policy on electronic availability of transcripts (i.e., that courts that make documents electronically available also make electronic transcripts of court proceedings available, if such transcripts are otherwise prepared, JCUS-SEP 03, pp. 16-17) will not go into effect at this time, however. Implementation of that policy has been delayed, pending completion of a report on a pilot project designed to assess the impact on court reporter income. The report is due in September 2005.

By way of background, in September 2001, the Judicial Conference of the United States adopted, upon the recommendation of the Committee on Court Administration and Case Management, a policy regarding privacy and public access to electronic case files (JCUS-SEP/OCT 01, pp. 48-50). This policy generally permits remote public access to electronic case files in civil and bankruptcy cases, with the requirement that certain personal identifiers be redacted by the filer of a document. This policy stated that there would be no such access in criminal cases for a period of two years while issues unique to criminal cases were studied in greater detail.

Following a pilot project and study completed by the Federal Judicial Center, and with the recommendation of the Committees on Criminal Law and Court Administration and Case Management, the Judicial Conference, at its September 2003 session, amended its earlier policy to allow remote public access to electronic criminal case file documents to be the same as public access to these documents at the courthouse. The Conference further determined that personal data identifiers must be redacted by the filer of the document, whether the document is filed electronically or in paper, as follows:

1. Social Security numbers to the last four digits;
2. financial account numbers to the last four digits;
3. names of minor children to the initials;
4. dates of birth to the year; and
5. home addresses to the city and state.

(JCUS-SEP 03, pp. 15-16). The Conference delayed the effective date of this policy change until it could approve specific guidance on the implementation and operation of the new policy that was to be developed by the Committees on Court Administration and Case Management, Criminal Law and Defender Services.

The Committee on Court Administration and Case Management formed a subcommittee, which included members from the committees on Criminal Law and Defender Services, to develop this requested guidance. The guidance and a model local rule addressing privacy and access to electronic criminal case files were presented to the Judicial Conference at its March 2004 session, at which time the Conference approved both documents. (JCUS-MAR 04, p. 10).

The guidance is divided into three parts. The first explains that the privacy policy regarding remote public access to electronic criminal case file documents is intended to make all case file documents that are available to the public at the courthouse available to the public via remote electronic access if a court is making case documents electronically available through PACER and CM/ECF. If a member of the public can access a criminal case file document at the courthouse, he or she should be able to access that same document through the court's electronic access system.

The second addresses the redaction requirements adopted by the Conference, as listed above, and encourages courts to provide notice to the bar, of the bar's obligation to redact these documents. It includes a model notice for this purpose, which explains the redaction requirements and also cautions counsel to be aware that documents they file may implicate personal privacy and security; further, attorneys may want to consider filing a motion to seal

with any filing that contains certain information, such as a driver's license number, medical records, employment history, individual financial information, trade secret information, information regarding cooperation with the government, victim information or national security information.

The model notice also encourages counsel to share this information with their clients so that the clients are aware of the electronic availability of documents that may include this type of information, and it informs counsel that they should point out to the court that it may need to redact certain documents that it prepares, such as an order setting conditions of release, in order to comply with the policy.

The third section of the guidance addresses documents for which there should be no public access, whether in paper or electronic form. These documents include unexecuted warrants, presentence reports, supervision violation reports, the statement of reasons that is part of a criminal judgment, juvenile records, financial affidavits submitted seeking court appointed counsel, *ex parte* requests for expert or investigative services at court expense, and sealed documents. This section also reminds the reader that courts maintain the discretion to seal any document and reminds the court to consider the content of a document when making such a determination.

Finally, this section recognizes that there are some documents that are not to be part of the public case file but which still should, or in some cases must, be available to the public. These include vouchers for payment of counsel appointed by the court. The guidelines make reference to a specific portion of the *Guide to Judiciary Policies and Procedures* that addresses the public availability of such payments and requests.

The local rule regarding the availability of electronic criminal case file documents to the public is similar to that used by the courts for implementation of the civil and bankruptcy privacy policies. It sets out the redaction requirements as explained above and makes it clear that the responsibility for redaction rests with counsel and the parties, not with the clerk of court.

Courts in which Version 2.2 has not been installed by November 1, 2004, should be aware that any documents filed electronically or converted to electronic format on or after that date will become available remotely once that software is installed. Therefore, in these courts, all criminal case file documents which will become available remotely should be redacted in accordance with the Conference policy.

If you have questions about the operation of the policy, please contact Abel Mattos at 202-502-1560 or via email. If you have questions about the software changes, please contact Dan Elsroad or David Scott at 202-502-1570 or via email.

cc: Chief Judges, United States Courts of Appeals
Clerks, United States Circuit Courts
Circuit Executives